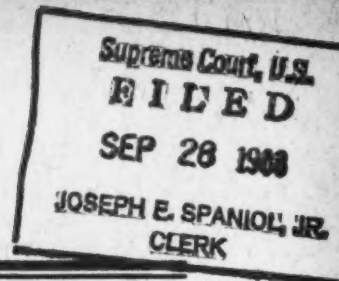


(2)

No. 88-205



In the Supreme Court of the United States

OCTOBER TERM, 1988

DOYLE E. CAMPBELL AND DOYLE E. CAMPBELL, M.D.,
INC., AN OHIO CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

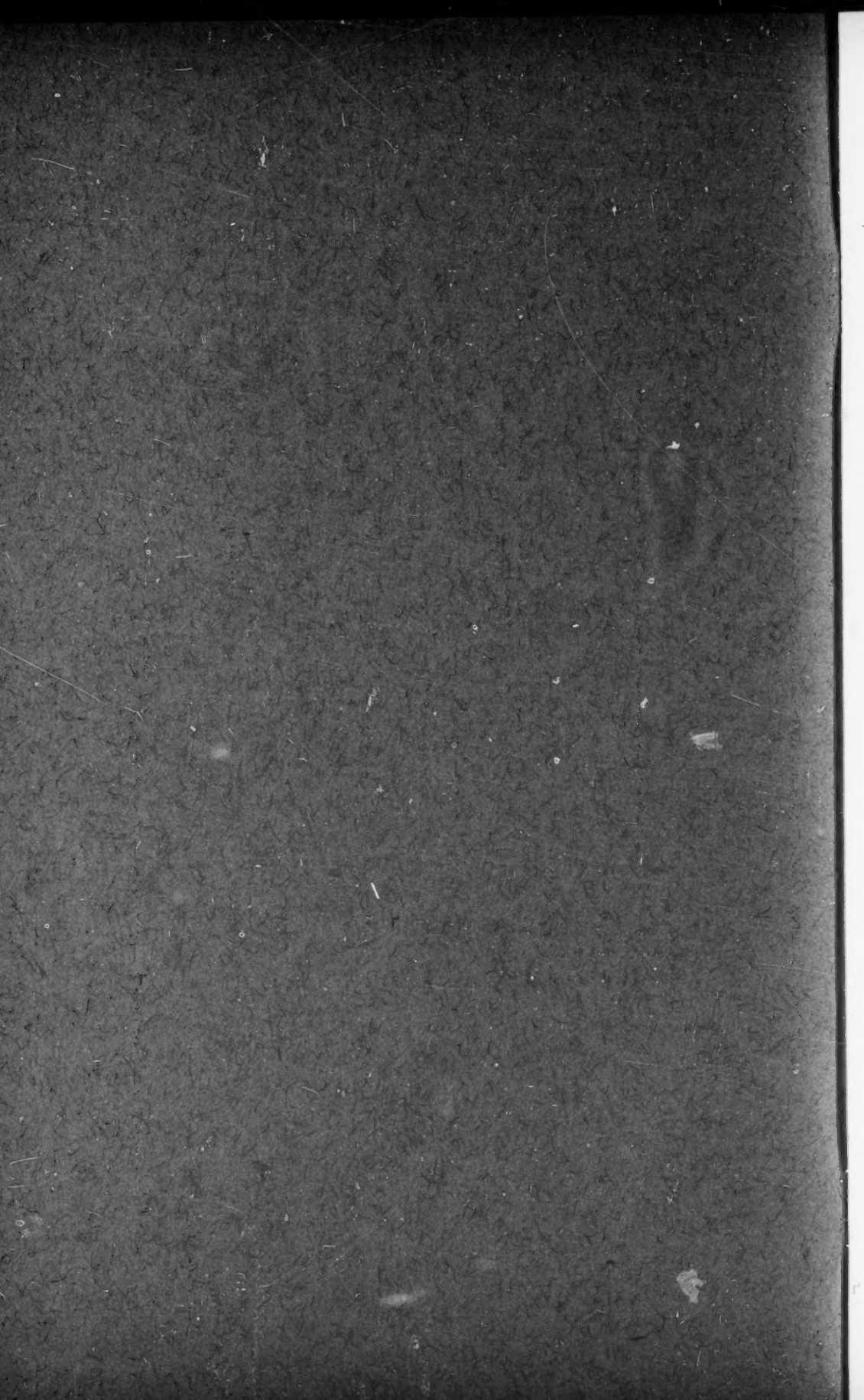
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QUESTIONS PRESENTED

1. Whether the district court properly admitted certain "similar act" evidence at trial.

2. Whether the district court properly admitted depositions from certain elderly witnesses who were unable to testify at the trial.

3. Whether this Court's decision in *McNally v. United States*, No. 86-234 (June 24, 1987), prohibits the application of the mail fraud statute, 18 U.S.C. 1341, to a physician who uses the mails in a scheme to obtain Medicare reimbursement benefits through fraud.

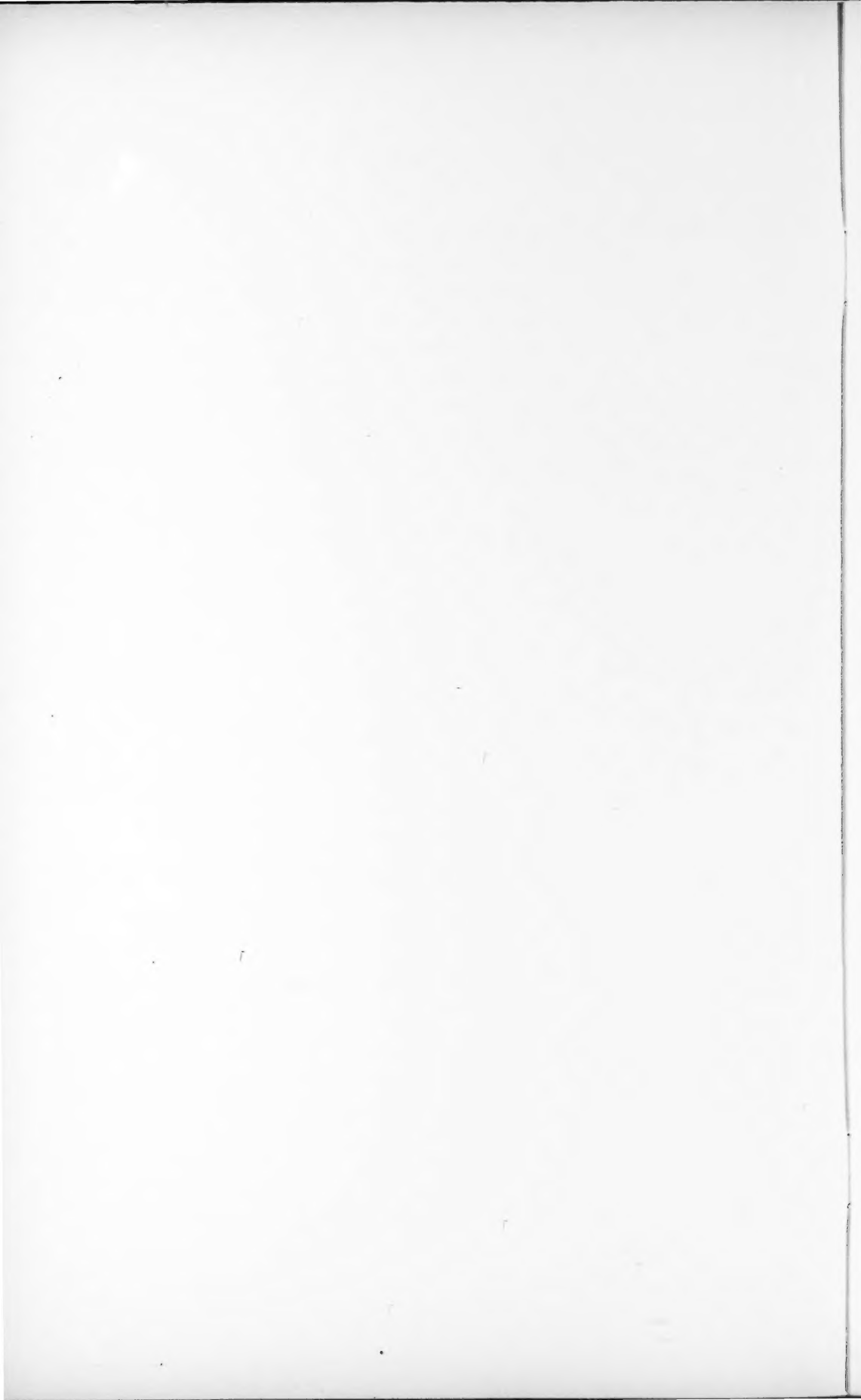


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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 845 F.2d 1374.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. A petition for rehearing was denied on May 25, 1988. The petition for a writ of certiorari was filed on July 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, petitioners Doyle E. Campbell and his professional corporation, Doyle E. Campbell,

M.D., Inc., were convicted on 34 counts of mail fraud (18 U.S.C. 1341), and 18 counts of filing false claims with the government (18 U.S.C. (& Supp. IV) 287). Campbell was sentenced to 14 months' imprisonment and a fine of \$75,400, and his corporation was fined the same amount. The court provided that payment of the fine by either petitioner would be credited against the other. The court of appeals affirmed (Pet. App. 1-23).¹

1. The evidence at trial showed that petitioner, an ophthalmologist practicing in southern Ohio, administered unnecessary or deliberately ineffective medical treatment to some 25 elderly patients and then submitted claims to the Department of Health and Human Service's fiscal intermediary for reimbursement under the Medicare insurance program. Petitioner's claims ranged from \$900 to \$950 per patient, and petitioner received Medicare reimbursement payments ranging from \$530 to \$680 per patient. Pet. App. 2-3.

Petitioner ostensibly administered medical treatment to remedy glaucoma, an eye disorder characterized by ocular hypertension—or increased internal pressure within the eye—that can cause nerve damage and consequent impairment of vision. The standard medical treatment for glaucoma involves application of eyedrops and other medication to remedy the condition. If medicinal therapy proves ineffective, a physician may administer a treatment known as Argon Laser Trabeculopasty (ALT), which involves the use of a laser to place small burns on the eye's "trabecular meshwork," which is the "drain" that permits fluids to leave the eye. Standard medical practice dictates that the ALT treatment should be used only if medication

¹ We will follow the court of appeals' convention of referring to petitioners Campbell and his professional corporation in the singular. See Pet. App. 2 n.1.

fails to relieve glaucoma's symptoms. If the ALT treatment is used, standard medical practice calls for 40 to 100 burns, at a power setting of 600 to 1,000 milliwatts, over a 360-degree radius of the eye. Furthermore, the treatment is not effective unless a "gonioscopic lens" is placed over the eye. Pet. App. 3-4, 18-19.

Petitioner administered ALT treatment to the elderly patients involved in this case. Most of those patients, however, did not suffer from glaucoma at the time petitioner administered the ALT treatment, and others did not receive proper medicinal therapy prior to that treatment (Pet. App. 18-19). Furthermore, petitioner did not administer the ALT treatment in a medically acceptable manner. Petitioner testified at trial that he generally made 15 to 25 burns, at a power setting of 300 milliwatts, in a patient's eye. But petitioner's medical assistants said that petitioner administered only five to 10 burns, and many patients testified—based on the distinctive clicking noise made when the laser is fired—that they received five or fewer "shots" (*id.* at 4, 19). Several patients also said that petitioner failed to place a "gonioscopic lens" over their eyes before administering the ALT treatment (*ibid.*).

2. On appeal, petitioner challenged the district court's admission of witness depositions, in lieu of live testimony, in the case of several elderly witnesses whose medical condition prevented them from appearing at trial. The court of appeals held that the district court did not abuse its discretion in admitting the deposition testimony without first conducting a special hearing to determine whether the witnesses were physically unable to appear in person (Pet. App. 7). The court of appeals further concluded that the videotaped depositions were not rendered invalid by the prosecutor's failure to obtain signed copies of the deposition transcripts. The court explained that petitioner did not challenge the accuracy of the depositions and that the

prosecutor's omission was, at most, harmless error (*id.* at 9). The court of appeals also held that the prosecutor's failure to obtain special permission to videotape the depositions was, at most, harmless error because petitioner's counsel was present at the tapings and did not object to the videotape format (*id.* at 11).

Petitioner also challenged the district court's admission of testimony from two patients, not identified as victims in the indictment, who described petitioner's treatment methods. The first patient testified that she was billed for an ALT treatment that was not performed, and that after she complained she received a partial refund (Pet. App. 12). The second patient testified that she was told that she had received an ALT treatment, but that she did not see the flashes of light that accompany that treatment (*ibid.*). The court of appeals concluded that the district court properly refused to exclude the testimony under Fed. R. Evid. 404(b), which prohibits admission of "similar act" evidence offered solely "to prove the character of a person in order to show action in conformity therewith." The court observed that the testimony was offered for the permissible purpose of showing that petitioner acted intentionally and in bad faith when improperly billing and administering ALT treatments (Pet. App. 12-13). The court of appeals further held that the district court did not abuse its discretion in determining, under Fed. R. Evid. 403, that the probative value of the evidence outweighed its prejudicial effect. It additionally observed that the testimony "was directly relevant to the issue of whether the defendant had knowingly engaged in a scheme to defraud his patients and their insurers by charging for unnecessary treatments" (Pet. App. 13).

Petitioner also objected on appeal to the admission of certain physical evidence; he argued that his acts did not constitute crimes; and he challenged the sufficiency of the

evidence at trial. The court of appeals rejected each of those contentions. Pet. App. 13-19. Judge Martin filed a partial dissent concluding that the trial court erred in admitting the testimony of the two patients who were not listed in the indictment as victims of petitioner's fraud (*id.* at 20-23). He stated that in his view the testimony was not relevant to the question of petitioner's intent.

ARGUMENT

1. Petitioner contends (Pet. 9-13, 19-20) that the district court should not have admitted testimony from two of his patients who were not identified in the indictment as victims of his fraud. He further argues (*id.* at 9) that, in reviewing the district court's ruling, the court of appeals "did not apply the test established by this Court in *Huddleston v. United States*, [No. 87-6 (May 2, 1988),]" for determining the admissibility of "similar act" evidence. But as the *Huddleston* decision recognizes (slip op. 6-10), the Federal Rules of Evidence set forth the standards for the admission of similar act evidence. The court of appeals correctly applied those standards here.

The court of appeals first determined, in accordance with Fed. R. Evid. 404(b), that the evidence was offered for a proper purpose, namely to demonstrate that petitioner knowingly engaged in improper billing and treatment. See Pet. App. 12-13; compare *Huddleston*, slip op. 6-7. The court next determined, in accordance with Fed. R. Evid. 403, that the district court did not abuse its discretion in concluding that the probative value of the evidence outweighed its prejudicial effect. See Pet. App. 13; compare *Huddleston*, slip op. 7-8. Finally, the court determined, in accordance with Fed. R. Evid. 401 and 402, that the evidence "was directly relevant to the issue of whether the defendants had knowingly engaged in a scheme to defraud

his patients and their insurers by charging for unnecessary treatments.” Pet. App. 13; compare *Huddleston*, slip op. 6, 8. Thus, the court of appeals clearly applied the correct standards in evaluating the district court’s admission of the two patients’ testimony.²

Petitioner also contends that the admission of the patients’ testimony violated his “due process right to a fair trial” (Pet. 19-20). But as this Court noted in *Huddleston*, the Federal Rules of Evidence amply protect a defendant’s right to a fair trial (slip op. 10-11). Because the evidence was relevant to disputed issues in the case and because its probative value was not substantially outweighed by its prejudicial impact, the admission of the evidence did not deny petitioner a fair trial.

2. Petitioner next argues (Pet. 13-19) that the videotaped depositions were improperly admitted into evidence because the prosecutor failed to comply with some of the formal requirements for the use of deposition testimony and because the government did not show that the witnesses were unavailable. As the court of appeals explained, petitioner’s factbound claims amount, at most, to harmless error and do not present any issue warranting this Court’s review.

² The dissenting judge agreed that the majority applied the correct standards, but he disagreed with the majority’s application of the standards in this case (Pet. App. 20). In particular, he questioned the relevance of the admitted testimony (*id.* at 20, 21). However, the patients’ testimony was clearly relevant within the meaning of Fed. R. Evid. 401. The testimony, which indicated that petitioner acted knowingly and intentionally when he improperly treated and billed those two patients, supported a finding that petitioner acted with similar knowledge and intent when he administered the same treatments to the patients involved in this case. Even if the dissenting judge’s objection to the admission of the evidence in this case were valid, it would not raise a question of general importance warranting this Court’s review.

Petitioner challenges (Pet. 14-17) the prosecutor's failure to obtain signatures on the deposition transcripts, but petitioner has offered nothing to overcome the court of appeals' conclusion that any such error was harmless. Here, as in the lower court (Pet. App. 9-10), petitioner has not identified any alleged inaccuracy in any of the depositions, nor has he shown any prejudice arising from the witnesses' failure to review and sign the transcripts. As the court of appeals noted (*id.* at 9), petitioner's counsel was present at each deposition and thus could have objected or pointed out any mistakes in the transcript. As the court further observed (*id.* at 10), the use of the videotaped depositions at trial "eliminate[d] the risk of error resulting from typographical mistakes which occasionally occur during the course of stenographic transcription." The jury was fully able to hear and observe the witnesses' testimony, just as if the witnesses had testified at trial. Thus, the prosecutor's failure to satisfy the formal authentication requirements in this case clearly would not warrant reversal of petitioner's conviction and does not present any question warranting this Court's review. See Fed. R. Crim. P. 52(a); 28 U.S.C. 2111.

Petitioner also argues (Pet. 17-19) that the district court erred in finding that the witnesses were unavailable for trial. There is no merit to that argument. On February 10, 1987, the district court granted the government's uncontested request, in accordance with Fed. R. Crim. P. 15, to depose the witnesses because of their possible unavailability at trial owing to their age and fragile health (Pet. App. 5, 7). Ten days later, the government moved for permission, in accordance with the "unavailability" requirement of Fed. R. Crim. P. 15, to use the depositions at trial (Pet. App. 5-6). Petitioner objected, and the court overruled that objection. As the court of appeals explained (*id.* at 7), the district court acted well within its discretion in

allowing the use of the depositions. Petitioner did not voice any doubt as to the witnesses' poor health at the time the district court granted the government's motion to take the depositions. "By admitting the depositions at trial, the district judge implicitly found that the exceptional circumstances which initially justified the taking of the depositions were still present since it was highly unlikely that an elderly invalid would undergo a miraculous rejuvenation during the two-week interval" (*ibid.*). The district court's action in this case was certainly reasonable and, in any event, does not present a question of general importance warranting this Court's review.³

3. Finally, petitioner contends (Pet. 20-22) that this Court's decision in *McNally v. United States*, No. 86-234 (June 24, 1987), demonstrates that his conduct is not proscribed by the mail fraud statute, 18 U.S.C. 1341. There is no merit to that argument. In *McNally*, this Court held that Section 1341 was intended to protect tangible property rights and does not extend to the protection of the citizens' intangible right to good government (slip op. 9-10). As the court of appeals explained, that holding has no bearing on this case. The government charged and the jury properly found that petitioner had engaged in "a fraudulent scheme to obtain *money* from his patients and the government" (Pet. App. 17 (emphasis in original)). "This type of conduct is clearly within the traditional parameters of the offense described in section 1341" (*ibid.*).

³ Petitioner suggests in passing (Pet. 18) that the admission of the depositions violated his Sixth Amendment right to confrontation. Petitioner's counsel was present, however, during the taking of the depositions and had a full opportunity to cross-examine the witnesses. In addition, because the depositions were videotaped, the jury was able to see and hear the witnesses, so the jury was able to assess the witnesses' credibility.

Petitioner's additional contention that the false claim statute has no application here because his reimbursement claims were not false is also without merit. The jury determined that he submitted false claims, and the court of appeals correctly concluded that there was ample evidence to support the jury's verdict on those counts (Pet. App. 18-19).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1988